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No. 03-577

In The
Supreme Court of the United States

HAROLD FRANK AND FOREST COUNTY POTAWATOMI COMMUNITY OF WISCONSIN,

Petitioners,

v.

FOREST COUNTY, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

A local redistricting plan with a maximum population deviation in excess of 10%, while presumptively unconstitutional under the one-person, one-vote guarantee of the Equal Protection Clause, may still survive challenge if it is justified by legitimate considerations incident to the effectuation of a rational state policy. The county supervisor redistricting plan adopted by Respondents in 2001, while it has a maximum population deviation of 18.3%, was correctly found both by the district court and the Seventh Circuit Court of Appeals to be justified by such considerations.

The district court and the Seventh Circuit also correctly found that Respondents' redistricting plan did violate § 2 of the Voting Rights Act. Petitioners now ask this Court to consider an issue under § 2 – namely, the appropriate measure of population data (i.e., total population, voting age population, or some other measure), that they did not press before the Seventh Circuit, an issue that does not save their vote dilution claim in any event.

Accordingly, the questions presented for review are as follows:

1. Whether the Seventh Circuit properly framed its analysis of Petitioners' equal protection claim under the 10% rule articulated by this Court in *Brown v. Thomson*, 462 U.S. 835 (1983), and, if so, whether Respondents' supervisor redistricting plan is justified by legitimate considerations incident to the effectuation of a rational state policy.

QUESTIONS PRESENTED FOR REVIEW – Continued

2. Whether the issue of the appropriate population measure for a § 2 claim is properly before this Court, and, if so, whether Petitioners' § 2 challenge to Respondents' supervisor redistricting plan must fail, regardless of whether total population, voting age population, or some other measure of population data is used to analyze their claim.

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STATUTE INVOLVED

Wis. Stat. § 59.10 (2001-02). (*See* Respondents' Appendix for text.)

STATEMENT OF THE CASE

Forest County is a rural county, 1,014 square miles in size, located in northeastern Wisconsin. (App. at 13.) According to the 2000 Census, only 10,024 people live in Forest County. (*Id.* at 18.) Fifty-seven percent of the census blocks in Forest County are unpopulated, resulting in a population density in the county of only 9.9 persons per square mile. (*Id.* at 1 & 13.) In contrast, Milwaukee County, Wisconsin's most populated county, has a population density of 3,891.4 persons per square mile. (*Id.* at 13.)

The Forest County Board of Supervisors (the "County Board") is comprised of twenty-one members, each elected from a single-member district in non-partisan elections held every two years. (*Id.* at 1-2.) Pursuant to its duties under § 59.10(3)(b) of the Wisconsin Statutes, the County Board undertook in April 2001 to redraw the twenty-one supervisor districts based on the 2000 Census data. (*Id.* at 15.)

A committee of the County Board, comprised of eight elected supervisors, including one Native American, held three public meetings in May 2001 to initially consider the redistricting. At one such meeting, the committee took public comments on a draft redistricting plan submitted by an outside consultant retained by the County Board. Pursuant to § 59.10(3)(b)(1) of the Wisconsin Statutes, on May 29, 2001, the County Board adopted the draft plan as

the County's tentative redistricting plan (the "Tentative Plan"). (*Id.* at 16.)

Thereafter, the County Board forwarded the Tentative Plan to all of the municipalities in Forest County for comment. Several towns, including Alvin and Argonne, objected to the Tentative Plan, voicing a concern that they not be split among several supervisor districts. (Record ("R.") 45, Exs. 5 & 6.)

The redistricting committee discussed the concerns voiced by the towns of Alvin and Argonne, as well as those raised during the redistricting process by Petitioners, at a public meeting on August 14, 2001. (*Id.*, Ex. 7.) The redistricting committee approved the Tentative Plan for recommendation to the full County Board at this same meeting. (*Id.*) On August 21, 2001, the County Board approved the Tentative Plan as the final county supervisor districting plan (the "2001 County Plan") following a public hearing. (*Id.*)

Given Forest County's total population of 10,024, the ideal population of each of the 21 supervisor districts for one-person, one-vote purposes is 477. (*Id.* at 18.) Under the 2001 County Plan, the largest supervisor district is District 2 (located in the town of Argonne), which has a population of 514. The smallest is District 12 (in the town of Nashville), which has a population of 428. Thus, the 2001 County Plan has a maximum population deviation of 18.03%. (*Id.*) All told, the average population deviation of the twenty-one districts is only 3.59%. Setting aside Districts 2 and 12, the average deviation of the remaining nineteen districts is 3.01%. (*Id.* at 19 & 38.) None of the three redistricting plans presented by Petitioners below alter the maximum deviation of the 2001 County Plan. (*Id.* at 19.)

The redistricting plan adopted by Forest County in 1991 (the "1991 County Plan") contained one majority-minority

district in favor of Native Americans. This district (then District 21) was located in the town of Nashville. (*Id.* at 15.) The 2001 County Plan maintains this majority-minority Native American district in Nashville (now numbered District 13). Under the 2001 County Plan, the racial makeup of District 13 is as follows:

2001 County Plan – District 13

	Total	White	%	Native American	%
Total Population	448	97	21.65%	348	77.68%
Voting Age Population	273	66	24.18%	205	75.09%

(*Id.* at 19, 37, & 39.)

In addition, the 2001 County Plan creates a second district (District 17 in the town of Lincoln) in which Native Americans are within 1% of a majority of the voting age population. Under the 2001 County Plan, the racial makeup of District 17 is as follows:

2001 County Plan – District 17

	Total	White	%	Native American	%
Total Population	492	213	43.29%	259	52.64%
Voting Age Population	306	146	47.71%	151	49.35%

(*Id.*)

This aspect of the 2001 County Plan is consistent with demographic changes in Forest County between 1990 and 2000. In fact, between 1990 and 2000, some of the greatest increases in Forest County's population occurred in the town of Lincoln. (R. 43 at 16-18.) Significantly, some of the greatest increases in the county's Native American population between 1990 and 2000 also occurred in Lincoln. (R. 43 at 16-18.)

In pursuing their claims under § 2 of the Voting Rights Act, Petitioners have focused on the creation of a minority-majority district in favor of Native Americans in the town of Wabeno. Petitioners argue that the boundaries of District 7 should be altered to affect this change. (App. at 20.)

Under the 1991 County Plan, Wabeno consisted of three whole supervisor districts. (*Id.* at 37 & 49.) However, based on the 2000 Census, Wabeno's population is insufficient to support more than two full supervisor districts by itself. (*Id.* at 20; R. 43 at 40.)

Petitioners have offered three different redistricting plans as alternatives to the 2001 County Plan. One of these plans, Plan 1, was proposed by Petitioners during the redistricting process before the County Board. The other two, Plans 2 and 3, were not proposed by Petitioners until discovery was underway in this litigation. (App. at 17.) Before the Seventh Circuit, Petitioners focused exclusively on Plan 3, raising no arguments with respect to Plans 1 and 2. (*Id.* at 8.) Now, Petitioners return to Plans 1 and 2, abandoning Plan 3.

Under the 2001 County Plan, District 7 has the following racial make-up:

2001 County Plan – District 7 – Total Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	488	274	56.15%	207	42.42%	0	0.00%

(*Id.* at 21 & 39.)

2001 County Plan – District 7 – Voting Age Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	304	198	65.13%	103	33.88%	0	0.00%

(*Id.* at 39.)

Under Petitioners' Plans 1 and 2, District 7 would have the following racial make-up:

Petitioners' Plans 1 and 2 – District 7 – Total Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	470	221	47.02%	242	51.49%	0	0.00%

(*Id.* at 21 & 42.)

Petitioners' Plans 1 and 2 – District 7 – Voting Age Population

District	Total	White	% of Total	Native American	% of Total	Black	% of Total
7	288	163	56.60%	122	42.36%	0	0.00%

(*Id.*)

REASONS FOR DENYING THE WRIT

A. The Seventh Circuit Did Not Abandon the 10% Rule of *Brown v. Thomson*, 462 U.S. 835 (1983), and Its Decision Is Not Otherwise in Conflict With *Brown* or Other Applicable Decisions of This Court.

Petitioners mischaracterize the holding of the Seventh Circuit with respect to their claim under the one-person, one-vote guarantee of the Equal Protection Clause. Specifically, the Seventh Circuit did not abandon the 10% rule established in *Brown v. Thomson*, 462 U.S. 835 (1983), and its decision is not otherwise in conflict with *Brown* or other decisions of this Court.

As this Court held in *Reynolds v. Sims*, the Equal Protection Clause requires that, in drawing state legislative districts, a state must make "an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable" so as to ensure that each person's vote is afforded equal weight in the election of representatives. 377 U.S. 533, 577 (1964). This "one-person, one-vote" guarantee also has been applied to local governmental

bodies in their districting efforts. *See, e.g., Avery v. Midland County, Tex.*, 390 U.S. 474, 478-79 (1968).

As this Court also acknowledged in *Reynolds*, however, some deviations from strict population equality among local legislative districts might be necessary to account for legitimate districting objectives such as maintaining the integrity of political subdivisions and ensuring compact districts of contiguous territory. *Reynolds*, 377 U.S. at 578-79. In *Gaffney v. Cummings*, this Court noted that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." 412 U.S. 735, 745 (1973). Quantifying the nature of such "minor deviations," this Court held in *Brown* that a local districting plan which provides for a maximum population deviation between the largest and smallest districts in the plan of less than 10% of the ideal population is *prima facie* constitutional under the one-person, one-vote standard. *Brown*, 462 U.S. at 843.

Even if a local redistricting plan has a maximum population deviation of 10% or greater, it may still comply with the Equal Protection Clause if it can be justified by the political subdivision in question. (*Id.*) As this Court reasoned in *Reynolds*, "[s]o long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-protection principles are constitutionally permissible." *Reynolds*, 377 U.S. at 579; *see also Mahan v. Howell*, 410 U.S. 315, 325, *modified on other grounds*, 411 U.S. 922 (1973); *Brown*, 462 U.S. at 843.

The Seventh Circuit expressly noted the *Brown* standard in upholding the judgment of the district court in favor of Respondents. (App. at 3-4.) Quoting the language of *Brown*, the Seventh Circuit described it, at once, as both a "safe harbor" and a "rule of prima facie liability." (*Id.* at 4.) Further, the Seventh Circuit expressly acknowledged this Court's admonition in *Chapman v. Meier*, 420 U.S. 1, 24-25 (1975), that sparse population, "without more, does not permit a substantial deviation from the average." (App. at 4.)

Far from abandoning the *Brown* standard, the Seventh Circuit only examined the difficulties in applying the standard in circumstances so far removed from the facts on which it was originally premised. (*Id.*) As the Seventh Circuit reasonably noted, the unusually small size of Forest County's population (even the legislative districts in *Chapman* were twenty-five times more populous than those at issue in the 2001 County Plan), coupled with the uneven distribution of the populace across the large area covered by the county's boundaries and the large number of supervisor districts, legitimately make it "harder to create districts of equal population without creating weird shapes that straddle the boundaries of the smaller governmental units." (*Id.*)

In the end, the extent and nature of the maximum population deviation presented by the 2001 County Plan (and, conspicuously, not corrected by Petitioners' Plans 1, 2, or 3) is only fairly examined against this backdrop. Indeed, given the population of Forest County and the number of supervisor districts, a population deviation of 5% results if a district is either over or under populated by only twenty-four persons, and a deviation of 10% (the limit of so-called *de minimus* deviations) results if a district is

over or under populated by only forty-eight persons. Further, the maximum population deviation of the 2001 County Plan exceeds the 10% mark by only thirty-eight people. (18.03% – 10% = 8.03%) (8.03% x 477 = 38). Finally, the 2001 County Plan exceeds the 16.4% deviation expressly approved by this Court in *Mahan v. Howell* by a mere eight people. (18.03% – 16.4% = 1.63%) (1.63% x 477 = 8). Without question, as the Seventh Circuit reasonably recognized, such information must inform a court's analysis of a redistricting plan and its maximum population deviation under one-person, one-vote principles, even if it, in and of itself, does not permit a departure from one-person, one-vote principles.

In full accord with *Brown*, *Mahan*, and other relevant decisions of this Court, the Seventh Circuit concluded its analysis by noting that "[a]t all events, even if intended to apply to the tiniest electoral districts, the 10 percent rule is merely one of prima facie liability, and is therefore rebuttable. . . ." (App. at 5.) (citing *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993)). As is discussed below, the Seventh Circuit then went on to examine the 2001 County Plan to determine whether Respondents had rebutted this presumption in light of the 18.03% deviation presented by the 2001 County Plan. (App. at 5-7.)

For these reasons, a full review of the Seventh Circuit's reasoning in upholding the judgment in favor of Respondents on Petitioners' equal protection claim reveals that the Seventh Circuit did not "discard" or "reject" the 10 percent rule of *Brown*. Far from presenting a conflict with prior decisions of this Court, the Seventh Circuit's holding represents a fair, reasoned application of this precedent. As a result, Petitioners' arguments fail to offer a basis for this Court to issue the requested writ of certiorari.

B. The Seventh Circuit Applied the Correct Level of Scrutiny to the Justifications Offered by Respondents for the Maximum Population Deviation of the 2001 County Plan, and the Reasons for the Deviation Are Sufficient to Satisfy One-Person, One-Vote Principles.

Applying the standard set forth in *Brown v. Thomson* with respect to Petitioners' one-person, one-vote challenge under the Equal Protection Clause, the Seventh Circuit applied the correct level of scrutiny to the justifications offered by Respondents for the population deviation of the 2001 County Plan. Further, contrary to the suggestion of Petitioners, Respondents presented a constitutionally sufficient record of the reasons for the population deviation. Both legally and factually, this case presents no reason for this Court to clarify prior precedent on these points.

1. The Seventh Circuit Applied the Correct Level of Scrutiny.

Petitioners argue that the Seventh Circuit applied the wrong level of scrutiny to the justifications offered by Respondents for the maximum population deviation of the 2001 County Plan. A review of applicable precedent reveals this concern to be unfounded.

In *Mahan v. Howell*, this Court was confronted with an equal protection challenge to a statute reapportioning the Virginia state legislature. 410 U.S. at 317. Under the statute in question, the reapportionment of the Virginia House of Delegates resulted in a districting plan that entailed a maximum population deviation of 16.4%. Yet, with one exception, this Court noted, the district lines

contemplated under the reapportionment plan followed the boundaries of local political jurisdictions such as counties and cities. (*Id.* at 319.) Agreeing that a policy of adhering to local political jurisdictional lines in drawing legislative districts was rational, this Court concluded that the redistricting plan reasonably advanced such a policy. (*Id.* at 325-28.) According to this Court, the relevant inquiry was whether the state policy offered to justify the maximum population deviation was in fact furthered by the reapportionment plan. (*Id.* at 326.) Contrary to the argument of Petitioners, nothing in the *Mahan* decision suggests that this Court determined that a justification for a districting plan, evidencing a rational state policy furthered by the plan, must be shown to match the actual intent of the legislators in adopting the plan.

Subsequent decisions of the Supreme Court also do not support the analysis suggested by Petitioners. For instance, in *Brown v. Thomson*, this Court, quoting *Mahan*, noted that "[t]he ultimate inquiry, therefore, is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy.'" *Brown*, 462 U.S. at 843. In *Voinovich v. Quilter*, the Court relied on the exact same formulation of the standard, citing both *Brown* and *Mahan*. *Voinovich*, 507 U.S. at 161. *See also Swann v. Adams*, 385 U.S. 440, 444 (1967) (describing the applicable burden of proof as requiring the districting entity to offer "a satisfactory explanation grounded on acceptable state policy"). Although Petitioners argue that the language of *Reynolds* counsels in favor of a standard that requires proof of the actual reasons underlying the adoption of the redistricting plan in question, the *Reynolds* Court seemingly did not face this precise question in the appeal before it. This fact, coupled with the subsequent readings of

Reynolds offered by the Supreme Court in cases such as *Mahan, Brown*, and *Voinovich*, leaves Petitioners' position without solid support.

The other cases assembled by Petitioners do not establish that the language of the *Mahan* decision is to be interpreted differently than it was by the Seventh Circuit or the district court in this case. Indeed, read properly, the portions of this Court's decision in *Karcher v. Daggett*, 462 U.S. 725, 740-41 (1983), *aff'd*, 467 U.S. 1222 (1984), a congressional redistricting case, quoted by Petitioners, speak only of the need for the districting entity to show that the plan in question actually advances the legitimate state objective offered as a justification for the population deviation of the plan. In addition, *Evans v. Cornman*, 398 U.S. 419 (1970), and *Dunn v. Blumstein*, 405 U.S. 330 (1972), both involved state restrictions on the right to vote and, thus, do not offer direct insight into the standard applicable in this context.

Not insignificantly, however, the analysis followed by the Seventh Circuit (and the district court, for that matter) finds ample support in the well-established framework of rational basis review utilized in analyzing other equal protection claims. *See, e.g., F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (observing that "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature"); *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969) (noting that "[l]egislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them").

In addition, the context supplied by the Seventh Circuit for its analysis – by referencing questions regarding inherent inaccuracies in census figures, population shifts over time, and the number of districts subject to the redistricting, finds support in relevant case law of this Court and the federal circuit courts. *See, e.g., Wisconsin v. City of New York*, 517 U.S. 1, 6-7 (1996); *Abrahms v. Johnson*, 521 U.S. 74, 100-01 (1997); *Sutton v. Dunne*, 681 F.2d 484, 487 (7th Cir. 1982).

2. Sufficient Justifications Exist for the Population Deviation of the 2001 County Plan.

With these principles in mind, the Seventh Circuit properly found that Respondents sufficiently justified the maximum population deviation of the 2001 County Plan. In addition, as both the Seventh Circuit and the district court noted, Petitioners' Plans 1, 2, and 3 do not alter the boundaries of the most and least populous districts in the 2001 County Plan (Districts 2 and 12) and, thus, do not decrease the maximum population deviation they challenge as unconstitutional. (App. at 8 & 19.)[1]

Applicable precedent establishes that the preservation of local political subdivisions is a legitimate policy goal in a redistricting effort. For instance, in *Mahan v. Howell*, this Court agreed that the policy of adhering to local

[1] An additional alternative offered by Petitioners for the first time at trial before the district court was presented without a map to indicate its boundaries and thus rejected by the Seventh Circuit. (App. at 8.)

political jurisdictional lines in drawing legislative districts was rational, and the Court upheld the plan in question after concluding that it reasonably advanced such a policy. 410 U.S. at 325-30. Likewise, in *Brown v. Thomson*, this Court observed that Wyoming's policy of strictly adhering to county boundaries in drawing legislative districts was without question "supported by substantial and legitimate state concerns." *Brown*, 462 U.S. at 843-44. In Wisconsin, a county must adhere as closely as possible to municipal boundaries in drawing supervisor district boundaries. *See* Wis. Stat. § 59.10(3)(b)(1) (2001-02) (requiring that "[i]n the tentative [districting] plan, the board shall, whenever possible, place whole contiguous . . . parts of the same municipality within the same district").

With this legal context in mind, it is clear that the goal of maintaining municipal boundaries was an integral part of Respondents' efforts to redraw the supervisor districts following the 2000 Census. Indeed, the 1991 County Plan followed the boundaries of the various townships within Forest County almost without exception.[2] While certain larger townships such as Wabeno or Laona were necessarily split into two or more districts, the boundaries of supervisor districts under the 1991 County Plan did not cross town lines except in very limited instances. (App. at 49.)

Respondents carried this respect for town boundaries forward in the 2001 County Plan. (*Id.* at 37.) As Dr. Ronald

[2] The boundaries of the fourteen townships and the one city in Forest County are marked in the map key for the 2001 County Plan. (App. at 37.)

Weber, one of Respondents' expert witnesses, noted, and as the district court acknowledged, each of these township splits was necessary to advance equal protection principles of population equality among the districts. (*Id.* at 27-28.) Working within the limitations mandated by the one-person, one-vote guarantee, however, the 2001 County Plan, on its face, otherwise follows the state legislative mandate of adhering to township boundaries in drawing supervisor districts. In addition, aside from 2001 County Plan itself, the record contains other evidence illustrating that maintaining the integrity of local boundaries was an integral part of the public debate that occurred during the County Board meetings regarding the redistricting plan. (R. 45, Exs. 4-7 & 9.)

As is noted above, the maximum population deviation of the 2001 County Plan can be traced directly to the populations of two districts – Districts 2 and 12. Indeed, the average population deviation for all twenty-one of the districts is 3.59%, and, setting aside Districts 2 and 12, the average deviation of the remaining nineteen districts is 3.01%. (App. at 19 & 38.) In drawing the boundaries of Districts 2 and 12, Forest County faced other concerns, not the least of which was the need to maintain Native American influence in Districts 13 and 17, which also justify the resulting deviations from the ideal population.

District 2 encompasses the entire town of Argonne, with the exception of one small area in the southeastern corner of the town. Under the 2001 County Plan, this one portion of the town is included in District 17, the district immediately to the south of Argonne. (*Id.* at 37.) This reflected a change from the 1991 County Plan, which included all of Argonne in one district. (*Id.* at 49.) Forest County might have moved additional census blocks from

the bottom portion of Argonne into District 17 in an effort to reduce the population of District 2 even more, but this would have increased the total population of District 17, pushing its deviation from the ideal even higher than the present figure of 3.07%, and would have lowered the number of Native Americans in District 17 as a percentage of the population from its present mark of 49.35% of the voting age population. (*Id.* at 37-38.) Thus, such a shift in census blocks would only have decreased the influence of Native Americans in District 17, a result that a number of federal district courts have found to not be required under applicable case law. *See, e.g.*, *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1072, 1075 (D. Md. 1994); *Anne Arundel Co. Republican Cent. Comm. v. State Admin. Bd. of Election Laws*, 781 F. Supp. 394, 398 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992). Moreover, Petitioners explicitly demanded during the redistricting process before the County Board that the County *not* adjust the boundaries of District 17 in any way that would have affected the racial make-up of the district, threatening suit if Forest County did not heed their demands. (R. 45, Ex. 8.)

Other factors, such as a large number of unpopulated census blocks, avoiding additional township splits between districts, and maintaining communities of interest based on existing school district, fire, and emergency medical service boundaries, likewise counseled strongly against shifting additional census blocks from District 2 to District 1 (encompassing Hiles and part of Alvin) or to District 3 (made up by the towns of Caswell, Ross, Popple River, and a portion of Alvin). (App. at 37; R. 43 at 23; R. 50, Ex. A; R. 47, Exs. A & B.)

The district with the smallest population under the 2001 County Plan is District 12 in the town of Nashville. Any effort to draw additional population from the neighboring townships of Lincoln (District 16) or Freedom (District 11) would have resulted in an additional split in town boundaries. (App. at 37.) District 12 is also bordered in part by District 13, a district that is populated primarily by Native Americans. Thus, any effort to draw people from this district to add to the population in District 12 would only have diluted the Native American influence in District 13. (R. 44 at 13; R. 45 at 23-24.) Finally, District 12 is bordered in small part by District 14, another Nashville district. Yet, any shift of people from District 14 to compensate for the under population of District 12 would have reduced the population of District 14 (which is already below the ideal population in the 2001 County Plan), triggering a domino effect requiring shifts of population from District 15 in the city of Crandon or District 16 in the town of Lincoln. (*Id.*) As is noted above, the 2001 County Plan, insofar as it did not provide for any of these results, is founded in legitimate districting principles and is not condemned by the one-person, one-vote rule.[3]

[3] Petitioners only selectively quote from the testimony of the outside consultant retained by the County Board to assist in its redistricting efforts. Indeed, according to the sworn testimony of Mr. Faust, the subject of reducing the maximum population deviation of the redistricting plan was central to the County Board's actions. (R. 64, Ex. C at 85-86.)

3. Conclusion.

Petitioners' suggestion that the Seventh Circuit's holding undermines established one-person, one-vote principles is unfounded, both legally and factually. Petitioners, again, have failed to provide a sufficient basis for this Court to grant the requested writ of certiorari.

C. Petitioners' Current Argument Under § 2 of the Voting Rights Act Was Neither Presented to Nor Considered by the Seventh Circuit, and Petitioners' § 2 Claim Is Without Merit, Regardless of the Appropriate Measure of the Relevant Population Data.

Petitioners ask this Court to grant certiorari so that it may address the issue of whether total population, voting age population, or another population measure is the proper basis upon which to judge a claim under § 2 of the Voting Rights Act. This question was noted but not resolved in this Court's decision in *Johnson v. DeGrandy*, 512 U.S. 997 (1994).[4] However, in raising this issue, Petitioners ask the Court to address a question that the Seventh Circuit did not consider. In any event, the full record demonstrates that Petitioners' § 2 claim does not provide an appropriate vehicle for the resolution of this issue, as their claim does not satisfy the three preconditions

[4] The question presented on petition for a writ of certiorari in *Chen v. City of Houston*, 532 U.S. 1046 (2001), a case cited by Petitioners, involved the one-person, one-vote doctrine of the Equal Protection Clause, not § 2 of the Voting Rights Act. Likewise, this Court's recent decision in *Georgia v. Ashcroft*, 156 L. Ed. 2d 428 (2003), involved preclearance under § 5 of the Voting Rights Act, not § 2.

identified in *Thornburg v. Gingles*, 478 U.S. 30 (1986), or the totality of the circumstances test as a whole, regardless of the population measure used to analyze their claim.

1. Petitioners' Current Argument Is Not Properly Before This Court.

Before the district court, Petitioners presented three redistricting plans, Plans 1, 2, and 3, each focusing on the creation of a new Native American majority district in one supervisor district (District 7 in the town of Wabeno). (App. at 17 & 32.) Before the district court, Petitioners argued that total population figures should be used as the measure of whether their plans met the first of the three *Gingles* preconditions, arguing that the yet-unaccepted theory of "virtual representation" justified the inclusion of those not of voting age to assess their plans. (*Id.* at 32.) The district court rejected this argument, relying on Seventh Circuit precedent to apply voting age population figures as the appropriate measure. (*Id.* at 32-33.) Using voting age population figures, the district court rejected Petitioners' Plans 1 and 2 under the first *Gingles* precondition, as neither plan includes sufficient numbers of Native Americans of voting age to constitute even a simple majority in the proposed district. The district court also rejected Petitioners' Plan 3 – a plan that proposes a majority-minority district based on a "coalition" of Native American and African American voters – under the second *Gingles* precondition on the ground that Petitioners had failed to prove sufficient political cohesion. (*Id.* at 34-35.)

On appeal to the Seventh Circuit, Petitioners dropped any reference to Plans 1 and 2 altogether. Instead, Petitioners relied entirely on their minority coalition proposal,

Plan 3. (*Id.* at 8.) Further, in advancing their case with respect to Plan 3, Petitioners expressly avoided any argument that total population figures should be used to measure the plan, observing in a footnote in their principal brief that they were "not actively asking the [Seventh Circuit] to review this portion of the district court's decision at this time" but that they would request that this Court consider the issue were a writ of certiorari to be granted. Addressing Petitioners' Plan 3, the Seventh Circuit found that Petitioners had failed to prove any political cohesion between the Native Americans and African Americans residing within the proposed district, echoing the analysis of the district court. (*Id.* at 9-10.) Not surprisingly, given Petitioners' posture on appeal, the Seventh Circuit did not consider the issue of whether total population figures might be the proper basis for an analysis under § 2.

Having failed to rely on Plans 1 and 2, and having failed to argue that total population, and not voting age population, figures should be used to measure their plans under § 2 before the Seventh Circuit, Petitioners should not be permitted to pursue such an argument before this Court. As this Court recognized in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *See also Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 92 n.7 (2000) (noting that the Supreme Court does not generally address arguments that were not the basis for the decision below); *Holly Farms Corp. v. National Labor Relations Bd.*, 517 U.S. 392, 400 (1996) (same).

2. Petitioners' § 2 Claim Is Not an Appropriate Vehicle for Review of the Legal Issue Now Pressed by Petitioners.

In any event, petitioners' § 2 claim is not an appropriate vehicle for this Court to address the legal issue now framed by Petitioners in their petition for certiorari, as the record establishes that Petitioners' Plans 1 and 2 (the plans they now rely on) do not satisfy either the three *Gingles* preconditions or the totality of the circumstances test applicable to all § 2 claims.

To establish a vote dilution claim under § 2 of the Voting Rights Act, a protected minority group initially must prove the existence of three threshold conditions. *Gingles*, 478 U.S. at 50-51; *Growe v. Emison*, 507 U.S. 25, 39-41 (1993). First, the minority group must establish that it is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Second, the minority group must prove that it is politically cohesive. (*Id.* at 51.) Finally, the minority group must show that the white majority "votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." (*Id.*) Each of these conditions is a necessary element of any successful claim under § 2. *Emison*, 507 U.S. at 40-41 ("[u]nless these points are established, there neither has been a wrong nor can there be a remedy").

Petitioners' Plans 1 and 2 do not include Native Americans in the proposed district (District 7) in numbers sufficient to satisfy the first *Gingles* precondition. In both plans, District 7 would contain 242 Native Americans, or 51.49% of the total district population of 470. (App. at 42.) With such a bare majority of the total population, it cannot be said that Native Americans in the proposed district

would in fact be in a position to elect a candidate of their choice. *See, e.g., DeGrandy*, 512 U.S. at 1008 (noting that the first *Gingles* precondition requires "the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its [own] choice"). As a number of federal circuit courts have noted, minority districts must include substantially more of the minority in question than a bare majority of the total population if the minority is to be in a position to elect a candidate of its choice. *See, e.g., Barnett v. City of Chicago*, 141 F.3d 699, 702-03 (7th Cir. 1998); *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1348 (8th Cir. 1995); *Brewer v. Ham*, 876 F.2d 448, 451-53 (5th Cir. 1989); *Ketchum v. Byrne*, 740 F.2d 1398, 1413-16 (7th Cir. 1984). Thus, even if total population figures are the proper measure, Petitioners cannot meet the first *Gingles* precondition (at least not without forcing this Court to find that a bare majority of total population figures represents a majority sufficient to elect a minority candidate of choice).

Even assuming that Petitioners can satisfy the first *Gingles* precondition with respect to their Plans 1 and 2, Petitioners nonetheless fail to meet either the second or third *Gingles* preconditions. In particular, the evidence of record establishes that Petitioners have not shown that Native Americans in Forest County are sufficiently politically cohesive to satisfy the second *Gingles* precondition. (R. 44 at 18-20.) Likewise, Petitioners have not shown that white voters in Forest County engage in block voting based on race, proof that is required to satisfy the third *Gingles* precondition. (*Id.*)

Moreover, proof of the three *Gingles* preconditions alone is not sufficient to establish a § 2 claim. *DeGrandy*,

512 U.S. at 1011. This is true, according to the *DeGrandy* Court, because "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." (*Id.*) As a result, once a § 2 plaintiff establishes the three *Gingles* preconditions, the reviewing court must consider whether, based on the totality of the circumstances, minorities have been denied an equal opportunity to participate in the political process and to elect representatives of their choice. (*Id.*) As is well established, this review of the totality of the circumstances is governed by nine factors set forth in a U.S. Senate report included in the legislative history underlying § 2. *Gingles*, 478 U.S. at 44-45.

Evidence showing that the percentage of election districts in which the plaintiff minority group has an effective majority is equal to that group's percentage of the relevant population is an important consideration in such an analysis of the "totality of the circumstances." Although the *DeGrandy* Court cautioned that such "proportionality" is not dispositive of a § 2 claim, the Court simultaneously observed that the existence of proportionality is "obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'" 512 U.S. at 1020. Importantly, the *DeGrandy* Court also noted that § 2 does not require that a political subdivision create additional majority-minority districts simply because the minority population is so dispersed within the relevant geographic area to permit such districts. As this Court reasoned in *DeGrandy*:

> reading § 2 to define [minority vote] dilution as any failure to maximize [the number of majority-minority districts] tends to obscure the very object of the statute and to run counter to its textually stated purpose. One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.

(*Id.* at 1016-17.)

Here, Petitioners offered no specific proof before the district court under the framework of the nine factors in the Senate report, making only passing reference to the totality of the circumstances test. Absent such proof, however, their claim under § 2 cannot succeed, regardless of whether or not they meet the three *Gingles* preconditions, and regardless of whether total population or voting age population figures are used as the measure of their claim.

Finally, the record reflects that the 2001 County Plan already achieves proportionality as referenced by this Court in *DeGrandy* under the theory advanced by Petitioners. Indeed, Native Americans represent 11.70% of the total population of Forest County according to the 2000 Census (1173 of 10,024). (App. at 39.) As such, strict proportionality using total population figures would dictate that Native Americans be afforded two majority districts out of the twenty-one total supervisor districts (11.70% x 21 = 2.46). District 13 in the 2001 County Plan is a Native American majority district under any measure, as it is 77.68% Native American using total population figures. (*Id.*) In addition, assuming that a bare majority of total population is sufficient to create a minority-majority district (as Petitioners do in advancing their Plans 1 and

2), District 17 is also a Native American majority district, as it is 52.64% Native American using total population figures. (*Id.*) Accordingly, with two Native American districts (under Petitioners' theory), the 2001 County Plan achieves proportionality.

3. Conclusion.

Based on the foregoing, it is clear that this case is not an appropriate vehicle for this Court to consider the issue now raised by Petitioners, both because Petitioners' argument is one that is not properly before this Court and because Petitioners' claim under § 2 cannot be sustained regardless of whether total population or voting age population figures are the proper measure of a § 2 claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Wis. Stat, § 59.10 (2001-02):

59.10 Boards: composition; election; terms; compensation; compatibility. The boards of the several counties shall be composed of representatives from within the county who are elected and compensated as provided in this section. Each board shall act under sub. (2), (3) or (5), unless the board enacts an ordinance, by a majority vote of the entire membership, to act under sub. (1). If a board enacts such ordinance, a certified copy shall be filed with the secretary of state.

(1) SELF-ORGANIZED COUNTIES. (a) *Number of supervisors and apportionment of supervisory districts.* In each county with a population of at least 500,000, sub. (2) (a) and (b) applies. In counties with a population of less than 500,000 and more than one town, sub. (3) (a) to (c) applies. In counties with one town only, sub. (5) applies.

(b) *Terms.* The term of office of supervisors is 2 years. A board may determine whether the terms shall be concurrent or staggered. Supervisors shall be elected at the election to be held on the first Tuesday in April next preceding the expiration of their respective terms and shall take office on the 3rd Tuesday in April following their election. If the board determines that supervisors shall serve staggered terms, the board shall, by ordinance, provide for a division of supervisors into 2 classes, one class to be elected for one-half of a full term and the other class for a full term and thereafter the supervisors shall be elected for a full term. The board shall publish the ordinance as a class I notice, under ch. 985, before publication of the notice of the election at which supervisors are to be elected.

(c) *Compensation.* The method of compensation for supervisors shall be determined by the board.

(d) *Vacancies.* A board may determine the procedure for filling a vacancy.

(2) MILWAUKEE COUNTY. In each county with a population of at least 500,000:

(a) *Composition; supervisory districts.* Within 60 days after the population count by block, established in the decennial federal census of population, and maps showing the location and numbering of census blocks become available in printed form from the federal government or are published for distribution by an agency of this state, but no later than July 1 following the year of each decennial census, the board shall adopt and transmit to the governing body of each city and village wholly or partially contained within the county a tentative county supervisory district plan to be considered by the cities and villages when dividing into wards. The plan shall specify the number of supervisors to be elected and shall divide the county into a number of districts equal to the number of supervisors, with each district substantially equal in population and consisting of contiguous whole wards. Except as otherwise provided in this paragraph, the board shall develop and adopt the tentative plan in accordance with sub. (3) (b) 1. The board shall adopt a final plan by enacting an ordinance in accordance with sub. (3) (b) 2. to 4.

(b) *Election; term.* Supervisors shall be elected for 4-year terms at the election to be held on the first Tuesday in April next preceding the expiration of their respective terms, and shall take office on the 3rd Monday in April following their election.

(c) *Compensation.* Each supervisor shall be paid by the county an annual salary set by the board. The board may provide additional compensation for the chairperson. Section 66.0505 applies to this paragraph.

(3) OTHER COUNTIES. (a) *Classification; maximum number of supervisors.* Counties with a population of less than 500,000 and more than one town are classified and entitled to a maximum number of supervisors as follows:

1. Counties with a population of less than 500,000 but at least 100,000 shall have no more than 47 supervisors.

2. Counties with a population of less than 100,000 but at least 50,000 shall have no more than 39 supervisors.

3. Counties with a population of less than 50,000 but at least 25,000 shall have no more than 31 supervisors.

4. Counties with a population of less than 25,000 and containing more than one town shall have no more than 21 supervisors.

5. If the population of any county is within 2% of the minimum population for the next most populous grouping under this paragraph, the board thereof, in establishing supervisory districts, may employ the maximum number for such districts set for such next most populous grouping.

(b) *Creation of supervisory districts.* 1. Within 60 days after the population count by block established in the decennial federal census of population, and maps showing the location and numbering of census blocks

become available in printed form from the federal government or are published for distribution by an agency of this state, but no later than July 1 following the year of each decennial census, each board shall propose a tentative county supervisory district plan setting forth the number of supervisory districts and tentative boundaries or a description of boundary requirements, hold a public hearing on the proposed plan and adopt a tentative plan. The proposed plan may be amended after the public hearing. The board shall solicit suggestions from municipalities concerning the development of an appropriate plan. The board shall transmit to each municipal governing body in the county the tentative plan that is adopted. Each district shall consist of whole wards or municipalities. Each district shall be designated to be represented by one supervisor, and all districts shall be substantially equal in population. In the tentative plan, the board shall, whenever possible, place whole contiguous municipalities or contiguous parts of the same municipality within the same district. If the division of a municipality is sought by the board, the board shall provide with the plan a written statement to the municipality affected by each proposed division specifying the approximate location of the territory from which a ward is sought to be created for contiguity purposes and the approximate population of the ward proposed to effectuate the division.

2. Within 60 days after every municipality in the county adjusts its wards under s. 5.15, the board shall hold a public hearing and shall then adopt a final supervisory district plan, numbering each district. Wards within each supervisory district created by the plan shall be contiguous, except that one or more wards located within a city or village which is wholly surrounded by another city

or water, or both, may be combined with one or more noncontiguous wards, or one or more wards or portions of wards consisting of island territory as defined ins. 5.15 (2) (f) 3. may be combined with one or more noncontiguous wards or portions of wards within the same municipality, to form a supervisory district.

3. In this paragraph, a district which includes territory connected to other territory from corner to corner is contiguous.

4. The chairperson of the board shall file a certified copy of the final districting plan with the secretary of state.

(c) *Changes during decade.* After the enactment of a plan of supervisory districts under par. (b), a municipal incorporation, annexation, detachment or consolidation may serve as a basis for altering between federal decennial censuses the boundaries of supervisory districts, in the discretion of the board. The number of supervisory districts in the county shall not be changed by any action under this paragraph. Any plan of county supervisory districts enacted under par. (b) may be amended under this paragraph but shall remain in effect as amended until superseded by another plan enacted by the board under par. (b) and filed with the secretary of state.

(d) *Election and term of supervisors.* Supervisors are county officers, shall be elected for 2-year terms at the election to be held on the first Tuesday in April in even-numbered years and shall take office on the 3rd Tuesday in April of that year.

(e) *Vacancies.* If a vacancy occurs on the board, the board chairperson with the approval of the board shall

appoint a person who is a qualified elector and resident of the supervisory district to fill the vacancy for the unexpired portion of the term to which the person is appointed and until his or her successor is elected and qualified.

(f) *Compensation.* Each supervisor shall be paid a per diem by the county for each day that he or she attends a meeting of the board. Any board may, at its annual meeting, by a two-thirds vote of all the members, fix the compensation of the board members to be next elected. Any board may also provide additional compensation for the chairperson.

(g) *Mileage.* Each supervisor shall, for each day that he or she attends a meeting of the board, receive mileage for each mile traveled in going to and returning from the meetings by the most usual traveled route at the rate established by the board under s. 59.22 as the standard mileage allowance for all county employees and officers.

(h) *Limitation on compensation.* Except for services as a member of a committee as provided in s. 59.13 no supervisor shall be paid for more days' attendance on the board in any year than is set out in this schedule: in counties having a population of less than 25,000, 20 days; at least 25,000 but less than 100,000, 25 days; at least 100,000 but less than 500,000, 30 days.

(i) *Alternative compensation.* As an alternative method of compensation, in counties having a population of less than 500,000, including counties containing only one town, the board may at its annual meeting, by a two-thirds vote of the members entitled to a seat, fix the compensation of the supervisors to be next elected at an annual salary for all services for the county including all committee services, except the per diem allowance for

services in acquiring highway rights-of-way set forth in s. 84.09 (4). The board may, in like manner, allow additional salary for the members of the highway committee and for the chairperson of the board. In addition to the salary, the supervisors shall receive mileage as provided in par. (g) for each day's attendance at board meetings or for attendance at not to exceed 2 committee meetings in any one day.

(j) *Supplementary compensation.* The board, in establishing an annual salary, may enact an ordinance providing for a per diem for all committee meetings attended in excess of 40 committee and board meetings.

(4) COMPATIBILITY. No county officer or employee is eligible for election or appointment to the office of supervisor, but a supervisor may also be a member of a committee, board or commission appointed by the county executive or county administrator or appointed or created by the county board, a town board, a mosquito control district, the common council of his or her city, the board of trustees of his or her village or the board of trustees of a county institution appointed under s. 46.18.

(5) COUNTIES HAVING ONLY ONE TOWN. In all counties containing one town only, the board shall consist of the members of the town board and one supervisor from every village. A supervisor from a village shall be elected at the time the other village officers are elected. A majority of the members shall constitute a quorum of the county board. Each supervisor shall receive compensation and mileage as provided in sub. (3) (f) and (g). The chairperson of the board elected under s. 59.12 (1) may be, but need not be, the same person who is elected chairperson of the town board under s. 60.21 (3) (a).

(6) ENFORCEMENT OF DIVISION REQUIREMENT. If a county fails to comply with sub. (2) (a) or (3) (b), any municipality located in whole or in part within the county or any elector of the county may submit to the circuit court for the county within 14 days from the expiration of either 60-day period under sub. (2) (a) or (3) (b) a proposed tentative or final plan for creation of supervisory districts in compliance with this section. If the court finds that the existing division of the county into supervisory districts fails to comply with this section, it shall review the plan submitted by the petitioner and after reasonable notice to the county may promulgate the plan, or any other plan in compliance with this section, as a temporary supervisory district plan until superseded by a districting plan adopted by the board in compliance with this section.